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September 3, 2019

VIA EMAIL

Andrea Leshak
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
New York Caribbean Superfund Branch
290 Broadway, 17th Floor
New York, NY 10007-1866
Leshak.andrea@epa.gov

Re: HP's Response to EPA's Follow-up Requests for Information Pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability relating to the PROTECO Site in Peñuelas, Puerto Rico

Dear Ms. Leshak:

HP Inc. ("**HP**") is providing this response to EPA's follow-up request for information pertaining to the PROTECO Superfund Site in Peñuelas, Puerto Rico (the "**Site**"), received by HP via email dated August 20, 2019. This response supplements the responses submitted by HP to the EPA on May 29, 2019, June 28, 2019, and August 5, 2019 (the "**HP Response**"). Subject to the general and specific objections and reservations set forth in the HP Response and noted below, and without waiving these or other available objections or privileges, HP is providing this response. Please note that HP has no personal knowledge of the operations, activities or business relationships of Digital Equipment Corporation de Puerto Rico. The information provided in this response is based on a review of publicly available documents and historic documents located in HP's files.

585617

9. *Describe the current and past business relationship between Digital Equipment Corporation and Digital Equipment Corporation de Puerto Rico.*

Response:

There is no current business relationship between Digital Equipment Corporation and Digital Equipment Corporation de Puerto Rico. Neither entity currently exists. Digital Equipment Corporation de Puerto Rico was dissolved in 1995 pursuant to an authorization of dissolution dated April 15, 1993. Five years later, in 1998, Digital Equipment Corporation was acquired by Compaq. In 1999, Digital Equipment Corporation was merged into Compaq.

We have limited information on the past business relationship between Digital Equipment Corporation de Puerto Rico and Digital Equipment Corporation. It is our understanding that Digital Equipment Corporation de Puerto Rico was a direct subsidiary of Digital Equipment Corporation following its incorporation on October 15, 1968. However, for some period of time Digital Equipment Corporation de Puerto Rico was an indirect subsidiary of Digital Equipment Corporation. For example, during 1975 and 1976, Digital Equipment Corporation de Puerto Rico was a direct subsidiary of Digital Equipment Caribbean and Digital Equipment Caribbean was a subsidiary of Digital Equipment Corporation. The Articles of Incorporation of Digital Equipment Corporation de Puerto Rico were provided in the HP Response as **Ex. 42**.

As noted in the HP Response, the nature of the past business relationship between Digital Equipment Corporation de Puerto Rico and Digital Equipment Corporation was addressed by the United States District Court of the District of Puerto Rico and the First Circuit in the case of *Alvarado Morales v. Digital Equipment Corp.*, 669 F.Supp. 1173, 1177 (D.P.R. 1987) and 843 F.2d 613 (1988)[1]. The opinions were included in the HP Response as **Ex. 37**. The District Court found, and the First Circuit affirmed, that Digital Equipment Corporation de Puerto Rico and Digital Equipment Corporation had a conventional parent-subsidiary relationship and the two companies were separate and distinct corporate entities. The *Morales* case was litigated shortly after the period relevant to EPA's Request, 1986 to 1988 (the relevant manifests are dated 1984 and 1985). The District Court and First Circuit found that the two companies had separate corporate structures, facilities, work forces, business

[1] The underlying dispute in the *Morales* case related to employment matters. However, both the District Court and the First Circuit found that a bona-fide parent-subsidiary relationship exited between Digital Equipment Corporation and Digital Equipment Corporation de Puerto Rico without regard to any employment law specific analysis. See, 669 F. Supp. 1173, 1182.

records, bank accounts, tax returns, financial statements, budgets, corporate reports and separate and distinct Boards of Directors. An affidavit of the President of Digital Equipment Corporation de Puerto Rico stated that Digital Equipment Corporation never operated a manufacturing facility in Puerto Rico. The affidavit was provided in the HP Response as **Ex. 38**. The District Court and First Circuit concluded that Digital Equipment Corporation had insufficient contacts with Puerto Rico to justify subjecting it to the Court's jurisdiction, and that Digital Equipment Corporation was not liable to the plaintiffs for the alleged conduct of Digital Equipment Corporation de Puerto Rico. For a more detailed discussion, see the response to Question 2 and the Introduction of the HP's June 28, 2019 letter. These judicial decisions were rendered when Digital Equipment Corporation de Puerto Rico and Digital Equipment Corporation had a relationship and individuals with personal knowledge were available to testify and provide relevant documents. The opinions of these courts and the underlying filings would be expected to be the most comprehensive and accurate description of the past business relationship between Digital Equipment Corporation and Digital Equipment Corporation de Puerto Rico that ended almost 25 years ago.

Digital Equipment Corporation had many other subsidiaries including a subsidiary in Germany, Digital Equipment GmbH. In 1980, in dismissing an employment-related claim against Digital Equipment Corporation, the United States District Court of the District of Massachusetts held that the evidence provided by Digital Equipment Corporation and Digital Equipment GmbH clearly demonstrated the distinct non-integrated nature of Digital Equipment Corporation and Digital Equipment GmbH. The court noted, "their operations, management, labor policy, and finances are all separate. Digital Corp. does not sufficiently control Digital GmbH so as to be held liable for the latter's alleged discriminatory acts."[2] The plaintiff appealed the decision and the First Circuit affirmed,[3] noting that the defendants' affidavits established that Digital GmbH personnel policies, advertising, and decisions were formulated without the involvement of Digital Corp. and the affidavits depicted a genuine parent-subsidiary relationship in which there were separate corporate structures, facilities, workforces, business records, bank accounts, tax returns, financial statements, budgets and corporate reports. The opinion of the United States District Court of Massachusetts and the First Circuit are enclosed as **Ex. 102**. Based on these opinions it

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[2] The Marques case was based on the claim of employment discrimination. However, the court evaluated the plaintiff's claim under both an employment law standard and the principle that where a parent corporation so controls the subsidiary it causes the subsidiary to become merely the agent or instrumentality of the parent.

[3] 637 F. 2d 24 (1980).

appears the Digital Equipment Corporation understood and consistently followed the protocols of corporate separateness between a parent company and its subsidiaries.

11. *Indicate whether Digital Equipment Corporation sold or otherwise divested itself of any stock, assets, or other interest in Digital Equipment Corporation de Puerto Rico.*

Response:

We have not located any information or documents indicating that Digital Equipment Corporation sold or otherwise divested itself of any stock, assets, or other interest in Digital Equipment Corporation de Puerto Rico. As noted previously, for a period of time, Digital Equipment Corporation de Puerto Rico was an indirect subsidiary of Digital Equipment Corporation. As indicated in the HP Response, Digital Equipment Corporation and Digital Equipment Corporation de Puerto Rico jointly sold the San German and Aguadilla facilities to third parties. As noted previously, Digital Equipment Corporation de Puerto Rico was dissolved in June 1995 pursuant to an authorization of dissolution dated April 15, 1993. We have not located any specific dissolution plan. However, since Digital Equipment Corporation de Puerto Rico stopped operating in 1992 or 1993 and sold its two plants in 1993, it is not clear that any assets would have been remaining in the company at the time of its dissolution.

12. *If your response to Request #11, above, is yes, fully describe the nature of the sale and/or transaction. State if the transaction consisted of a merger, consolidation, sale, or transfer of assets, and submit all documents relating to such transaction, including all documents pertaining to any agreements, express or implied, for the purchasing corporation to assume the liabilities of the selling corporation. Indicate whether Digital Equipment Corporation retained the liabilities of Digital Equipment Corporation de Puerto Rico for events prior to the sale.*

Response:

Not applicable.

Supporting documentation and request for clarification pertaining to original Request No. 10:

Please provide the original Agreement for the Sale and Purchase of Real Estate and Equipment to Sensormatic Electronics Corporation, referenced in HP Inc.'s response to Request No. 10.

Response:

We have enclosed the original Agreement for the Sale and Purchase of Real Estate and Equipment to Sensormatic Electronics Corporation dated March 1993 pertaining to the sale of the Aguadilla facility as **Ex. 103**. We apologize for its omission in the HP Response. Due to the time constraints involved in preparing the HP Response and the volume of exhibits provided to EPA, i.e. over 100 exhibits, we did not realize that the Amendment to the Agreement for the Sale and Purchase of Real Estate and Equipment that was provided to EPA in the HP Response did not also include the terms of the original Agreement.

Please submit all documents relating to the 1992 Agreement For the Purchase and Sale of Machinery and Equipment, also referenced in HP Inc.'s response to Request No. 10.

Response:

We have enclosed the Agreement for the Purchase and Sale of Machinery and Equipment with its schedules as **Ex. 104**. We have also enclosed a letter from DY-4 Corporation dated November 4, 1992 to Digital Equipment Corporation de Puerto Rico requesting that Digital Equipment Corporation de Puerto Rico provide a letter transferring all vested underground water rights to DY-4 Corporation as **Ex. 105**. We have also enclosed a letter from UNIPRO dated December 23, 1992 to the US EPA regarding the storm water Notice of Intent filed by DY-4 for the property as **Ex. 106.**

Identify the liabilities retained by Digital Equipment Corporation pursuant to Section 1.2 of the 1992 Agreement For the Purchase and Sale of Machinery and Equipment and explain the ultimate disposition of those liabilities. Identify the liabilities retained by Digital Equipment Corporation de Puerto Rico pursuant to Section 1.2 of the 1992 Agreement For the Purchase and Sale of Machinery and Equipment and explain the ultimate disposition of those liabilities.

Response:

The Agreement for the Purchase and Sale of Machinery and Equipment provides in Section 1.2(b):

> "For the purposes hereof, the Buyer shall not assume, pay, discharge or perform, any liabilities or obligations of Seller in connection with the Purchased Assets existing at the time of such Closing and Seller shall reimburse, indemnify and hold harmless Buyer and its successors and assigns in that respect."

We have not located any information that identifies the liabilities or obligations of the Seller (Seller is defined under the Agreement to include both Digital Equipment Corporation de Puerto Rico and Digital Equipment Corporation) that were retained under this provision of the Purchase and Sale of Machinery and Equipment Agreement. We note that under Section 2.6(c) of the Agreement, the Seller agreed to indemnify the Buyer for all liabilities arising from Pre-Closing Environmental Matters, which was defined as any contamination at the Leased Premises (parcels T-0881-0-67, S-0974-0-69, S-0974-1-69, S-1171-0-74, and L-0264-0-15-0B hereinafter the "**Rt. 362 Property**"), prior to the closing date. As noted in the HP Response, Digital Equipment Corporation retained responsibility to investigate and remediate the Rt. 362 Property under the Agreement to Terminate Lease between PRIDCO and Digital Equipment Corporation dated January 28, 1993 enclosed in the HP Response as **Ex. 52.** Upon Compaq's acquisition of Digital Equipment Corporation, Compaq continued the environmental investigation and remediation of the Rt. 362 Property to fulfil the contractual obligations assumed by Digital Equipment Corporation under the Agreement to Terminate Lease. Upon HP's acquisition of Compaq, HP continued the environmental investigation and remediation of the Rt. 362 Property and HP continues to manage the remediation of the Rt. 362 Property with oversight from the Puerto Rico EQB and EPA.

Please let us know if you have any additional questions. We would be happy to have a call with EPA to discuss the information included in this letter and our previous letters to EPA regarding the PROTECO site.

Sincerely,

Karen Davis

Karen Davis

KD:stj

Attachments: See Exhibit Table of Contents Below

cc: Jenny McClister, jenny.mcclister@hp.com
Christopher Michael Dirscherl, christopher.dirscherl@hp.com
Christopher M. Roe, croe@foxrothschild.com

Exhibits – Continuation from HP's June 28, 2019 Full Response

102. The opinion of the United States District Court of Massachusetts and the First Circuit in D. Mas Marques v. Digital Equipment Corporation.

103. The original Agreement for the Sale and Purchase of Real Estate and Equipment to Sensormatic Electronics Corporation dated March 1993

104. The Agreement for the Purchase and Sale of Machinery and Equipment with its schedules

105. The letter from DY-4 Corporation dated November 4, 1992 to Digital Equipment Corporation de Puerto Rico requesting that Digital Equipment Corporation de Puerto Rico provide a letter transferring all vested underground water rights to DY-4 Corporation

106. Letter from UNIPRO dated December 23, 1992 to the US EPA regarding the storm water Notice of Intent filed by DY-4 for the property

490 F.Supp. 56
United States District Court, D. Massachusetts.

Diego MAS MARQUES, Plaintiff,
v.
DIGITAL EQUIPMENT CORP. and
Digital Equipment GmbH, Defendants.

Civ. A. No. 78-3178-S.
|
Feb. 8, 1980.

Synopsis
Plaintiff, a United States citizen residing in West Germany, brought suit against Massachusetts parent corporation and its West German subsidiary alleging discriminatory personnel practices of subsidiary with respect to age, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964. Upon defendants' motion for summary judgment, the District Court, Skinner, J., held that: (1) Massachusetts parent corporation did not sufficiently control its West German subsidiary so as to state a cause of action against parent and (2) West German subsidiary did not have sufficient minimum contacts with Massachusetts for exercise of personal jurisdiction over it.

Motion allowed.

West Headnotes (7)

[1] Federal Civil Procedure
Pro Se or Lay Pleadings

Generally, a plaintiff's pro se pleadings must be held to a less stringent standard than those drafted by an attorney.

Cases that cite this headnote

[2] Civil Rights
Exhaustion of state or local remedies

Plaintiff's Age Discrimination in Employment Act claims against Massachusetts parent corporation and its West German subsidiary could not be considered where plaintiff failed to resort to mandatory state remedy before Massachusetts Commission Against Discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; M.G.L.A. c. 151B, § 1 et seq.

Cases that cite this headnote

[3] Civil Rights
Right to sue letter or notice; official inaction

Plaintiff, who alleged a discriminatory denial of employment based on national origin and who received a right to sue letter from Equal Employment Opportunity Commission, satisfied jurisdictional prerequisites for a suit under Title VII. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[4] Civil Rights
Vicarious liability; respondeat superior

In determining whether parent corporation could be held liable for alleged discriminatory acts and policies of its subsidiary, standard applied for purpose of Title VII action was identical to that promulgated by National Labor Relations Board: (1) interrelation of operations, (2) common management, (3) common control of labor relations, and (4) common ownership or financial control; plaintiff could alternatively show that parent corporation so controlled subsidiary as to cause subsidiary to become merely agent or instrumentality of the parent. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[5] Corporations and Business Organizations
Particular Occasions for Determining Corporate Entity

Massachusetts parent corporation did not sufficiently control its West German subsidiary so as to state a cause of action against parent for subsidiary's allegedly discriminatory acts with respect to a United States citizen residing in West Germany.

Cases that cite this headnote

[6] **Federal Courts**
Personal jurisdiction

Inasmuch as Title VII does not provide an independent basis for personal jurisdiction, such basis must be found in law of state in which action is brought. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. Rule 4(e), 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Courts**
Employment discrimination

Federal Courts
Related or affiliated entities; parent and subsidiary

West German subsidiary of Massachusetts parent corporation did not have sufficient minimum contacts with Massachusetts for the exercise of personal jurisdiction over it in action in which plaintiff, a United States citizen residing in West Germany, alleged discriminatory personnel practices with respect to age, sex, and national origin in violation of Title VII. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; M.G.L.A. c. 223, § 38; c. 223A, § 3.

Cases that cite this headnote

Attorneys and Law Firms

***57** Diego Mas Marques, pro se.

Ronald M. Green, Epstein, Becker, Borsody & Green, New York City, for defendants.

MEMORANDUM AND ORDER

SKINNER, District Judge.

Plaintiff brought this action pro se alleging discriminatory personnel policies with respect to age, sex, and national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s 2000e et seq., against Digital Equipment GmbH ("Digital GmbH"), a West German corporation, and its parent Digital Equipment Corp. ("Digital Corp."), a Massachusetts corporation. Defendants have filed a motion for summary judgment.

Plaintiff, a United States citizen residing in West Germany, alleges that he applied for an accounting or clerical position with Digital Equipment GmbH, in Munich, West Germany on April 28, 1977. Plaintiff further alleges that he was denied employment pursuant to company personnel policy preferring German nationals, to the exclusion of American citizens. In addition, plaintiff maintains that the express policy of Digital GmbH, manifested in its newspaper advertisements, was to systematically categorize various employment positions according to age and sex.

[1] Generally, plaintiff's pro se pleadings must be held to a less stringent standard than those drafted by an attorney, Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972), and, in a motion for summary judgment, the court must indulge all inferences favorable to the party opposing the motion. United States v. Diebold, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Nevertheless, the Federal Rules of Civil Procedure specifically provide that general allegations, while possibly sufficient to state a cause of action, must be supported by specific facts showing a genuine issue for trial to survive a summary judgment motion. Fed.R.Civ.P. 56(e). Plaintiff's conclusory allegations in his opposing papers, unsupported by affidavits, are not sufficient to controvert the facts averred, and supported, by defendants in their motion for summary judgment. Ashwell & Company, Inc. v. Transamerica Insurance Co., 407 F.2d 762 (7th Cir. 1969). See also, Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975). As a result, the following facts described by the defendants concerning their respective corporate structures are taken as true.

Digital GmbH is a wholly owned subsidiary of Digital Corp., and is separately incorporated under the laws of West Germany. Personnel policies of Digital GmbH are set exclusively by that corporation in conjunction ***58** with Digital Equipment International, a Swiss corporation, with no substantive input by Digital Corp. All employment decisions of Digital GmbH, including recruitment, hiring, training, promotion, termination, and establishment of working conditions are exclusively determined and implemented by Digital GmbH and Digital International. Specifically, the

advertisements described in plaintiff's complaint were drafted and reviewed by Digital GmbH employees, without any participation or supervision by Digital Corp.

On a broader scale, Digital Corporation and Digital GmbH have separate corporate structures, with independent business records, bank accounts, tax returns, financial statements and budgets. Digital Corp. exercises no control over sales goals and marketing strategies for Digital GmbH. Digital Corp. manufactures and sells computers and computer components at facilities located in the United States, Puerto Rico and Ireland. Digital GmbH is engaged in the repair, retail sale and distribution of computers and computer components solely within West Germany. Digital GmbH purchases fifty percent of its inventory from Digital Corp. pursuant to written sales contracts, which also provide for the occasional performance of administrative services, such as accounting and bookkeeping, for Digital GmbH. Digital GmbH is not licensed to, nor does it conduct business in the United States.

[2] **[3]** As a preliminary matter, I note that plaintiff's age claims may not be considered, for he has failed to resort to a mandatory state remedy before the Massachusetts Commission Against Discrimination, as required by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. ss 621 et seq. and M.G.L. c. 151B. Oscar Mayer Co. v. Evans, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979); Hadfield v. Mitre Corp., 562 F.2d 84 (1st Cir. 1977). Not only did plaintiff fail to allege a cause of action under the ADEA in his complaint,[1] he failed to allege his age. In addition, plaintiff has not specifically alleged that he was denied a position due to sex discrimination. Given the dispositive nature of the jurisdictional issues in this case, however, I need not reach the issue of whether discriminatory advertisements alone are sufficient to state a cause of action under Title VII. At a minimum, plaintiff has alleged a discriminatory denial of employment based on national origin, and he has received a right-to-sue letter from the Equal Employment Opportunity Commission, thereby satisfying the jurisdictional prerequisites for a suit under Title VII.

[4] Plaintiff has not alleged an application for, and denial of employment opportunities at Digital Corp. in the United States. He has confined his complaint to the policies of the West German corporation, Digital GmbH, and has remained at all times in West Germany, refusing to attend a deposition in the United States. The first issue, therefore, is whether the parent, Digital Corp., may be held liable for the alleged discriminatory acts and policies of its subsidiary, Digital GmbH. The standard to be applied to determine the propriety of consolidating separate entities for the purpose of this Title VII action is identical to that promulgated by the National Labor Relations Board: (1)interrelation of operations, (2) common management, (3) common control of labor relations, and (4) common ownership or financial control. Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965); Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977). Plaintiff could alternatively show that the parent corporation so controls the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent. Linskey v. Heidelberg Eastern, Inc., 470 F.Supp. 1181, 1184 (E.D.N.Y.1979).

***59** **[5]** The uncontroverted evidence supplied by the defendants clearly demonstrates the distinct non-integrated nature of Digital Corp. and Digital GmbH. As their operations, management, labor policy, and finances are all separate, Digital Corp. does not sufficiently control Digital GmbH so as to be held liable for the latter's allegedly discriminatory acts. Accordingly, the complaint fails to state a cause of action against Digital Corp.

[6] The second issue to be determined is whether Digital GmbH has sufficient “minimum contacts” in Massachusetts for the exercise of personal jurisdiction over it in this court. International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). As Title VII does not provide an independent basis for personal jurisdiction, such basis must be found in the law of the state in which the action is brought. Fed.R.Civ.P. 4(e). Massachusetts law provides two bases for the exercise of personal jurisdiction over foreign corporate defendants. M.G.L. c. 223A, s 3, the Massachusetts long-arm statute, confers personal jurisdiction over a defendant where, inter alia, the cause of action arises out of acts which take place in the Commonwealth.[2] M.G.L. c. 223, s 38 provides for personal jurisdiction over a corporate defendant doing business within the Commonwealth.[3]

[7] The present cause of action involves an allegedly discriminatory personnel policy engaged in by Digital GmbH. The only contacts Digital GmbH maintains with Massachusetts are inventory purchase contracts and ownership by a Massachusetts corporation. As the contracts are unrelated to the policies at issue, and it has been established that Digital Corp. exercises no control over Digital GmbH's employment decisions, the cause of action

does not arise from any acts within the Commonwealth. Personal jurisdiction may not lie under M.G.L. c. 223A, s 3. Whittaker Corporation v. United Aircraft Corp., 482 F.2d 1079, 1085 (1st Cir. 1973); Walsh v. National Seating Co., Inc., 411 F.Supp. 564 (D.Mass.1976). Similarly, "doing business" within the purview of M.G.L. c. 223, s 38, involves some substantial effect upon Massachusetts commerce, and requires more than a mere purchaser-supplier relationship. Caso v. Lafayette Radio Electronics Corporation, 370 F.2d 707 (1st Cir. 1966); Wilson v. Holiday Inn Curacao N. V., 322 F.Supp. 1052 (D.Mass.1971). The latter case, where the plaintiff brought ***60** suit in Massachusetts against a Holiday Inn incorporated in Curacao, on the basis of the defendant's relationship with its parent, Holiday Inns of America, Inc., doing business in Massachusetts, is particularly apt here. The Court there held the two entities were separate and distinct, using much the same analysis as was discussed here, and dismissed the claim for want of jurisdiction.

Accordingly, defendants' motion for summary judgment is ALLOWED.

All Citations

490 F.Supp. 56, 22 Fair Empl.Prac.Cas. (BNA) 87

Footnotes

1 Title VII by its terms does not afford relief for alleged victims of age discrimination. 42 U.S.C. ss 2000e et seq.

2 Ch. 223A

s 3. Transaction or conduct for personal jurisdiction

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(a) transacting any business in this commonwealth;

(b) contracting to supply services or things in this commonwealth;

(c) causing tortious injury by an act or omission in this commonwealth;

(d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

(e) having an interest in, using or possessing real property in this commonwealth; or

(f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting or

(g) living as one of the parties to a duly and legally executed marriage contract, with the marital domicile of both parties having been within the commonwealth for at least one year within the two years immediately preceding the commencement of the action, notwithstanding the subsequent departure of the defendant in said action from the commonwealth, said action being valid as to all obligations or modifications of alimony, custody, child support or property settlement orders relating to said marriage or former marriage, if the plaintiff continues to reside within the commonwealth.

3 Ch. 223

s 38. Foreign corporations

In an action against a foreign corporation, except an insurance company, which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of upon the state secretary under section fifteen of chapter one hundred and eighty-one.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Lavespere v. Niagara Mach. & Tool Works, Inc., 5th Cir. (La.), August 13, 1990

637 F.2d 24
United States Court of Appeals,
First Circuit.

Diego MAS MARQUES, Plaintiff, Appellant,
v.
DIGITAL EQUIPMENT CORPORATION, and
Digital Equipment GmbH, Defendants, Appellees.

No. 80-1222.
|
Submitted Sept. 12, 1980.
|
Decided Dec. 17, 1980.

Synopsis

Plaintiff, a United States citizen residing in West Germany, brought suit against Massachusetts parent corporation and its West German subsidiary alleging discriminatory personnel practices of subsidiary with respect to age, sex, and national origin in violation of Title VII of the Civil Rights Act of 1974. Upon defendants' motion for summary judgment, the United States District Court for the District of Massachusetts, Walter Jay Skinner, J., 490 F.Supp. 56, entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Bownes, Circuit Judge, held that: (1) the parent corporation did not exercise sufficient control over its West German subsidiary in order to be liable for alleged employment discrimination of the subsidiary; (2) the District Court did not have personal jurisdiction over a West German subsidiary under the Massachusetts long arm statute; and (3) the affidavit filed ten days after summary judgment was entered was insufficient to allow judgment to be set aside where no explanation was given for failure to present the affidavit or its contents earlier and no claim was made that further facts became known to plaintiff only after judgment had been entered.

Affirmed.

West Headnotes (7)

[1] Civil Rights

Multiple entities; third parties

78 Civil Rights
78II Employment Practices
78k1108 Employers and Employees Affected
78k1112 Multiple entities; third parties
(Formerly 78k204.1, 78k204, 78k13.7)

Even though plaintiff alleged that Massachusetts corporation was fully responsible for its West German subsidiary's general policy of employment discrimination, it was established that subsidiary's personnel policies, advertising and decisions were formulated without involvement of parent, and there was genuine parent–subsidiary relationship in which there were separate corporate structures, facilities, or courses, business records, bank accounts, tax returns, financial statements, budgets and corporate reports, and, therefore Massachusetts corporation would not be held responsible for acts of its subsidiary under Title VII. Civil Rights Act of 1964, §§ 701–718 as amended 42 U.S.C.A. §§ 2000e to 2000e–17.

26 Cases that cite this headnote

[2] Federal Civil Procedure

Civil rights cases in general

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 Civil rights cases in general

Even though pro se plaintiff may not have been aware of Rule of Civil Procedure governing summary judgments when he filed his first opposition to defendants' motion for summary judgment in action alleging violations of plaintiff's civil rights, defendants' reply memorandum put him on clear notice of rule and deficiencies of his initial response, and, therefore, when specific facts were not forthcoming in plaintiff's second opposition to summary judgment, and no attempt to provide them or conduct discovery was made, District Court was well warranted in granting summary judgment. Fed.Rules Civ.Proc. Rule 56(e, f), 28 U.S.C.A.

29 Cases that cite this headnote

[3] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 In general
(Formerly 170Ak2497)

In action brought against Massachusetts parent corporation and its West German subsidiary alleging discriminatory personnel practices of subsidiary, plaintiff's promise to prove his general allegations about relationship between parent and subsidiary through corporate records at trial was not enough to require trial as to parent corporation. Fed.Rules Civ.Proc. Rule 56(e, f), 28 U.S.C.A.

6 Cases that cite this headnote

[4] **Federal Courts**
Related or affiliated entities; parent and subsidiary

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2758 Aliens and Alien Entities
170Bk2762 Related or affiliated entities; parent and subsidiary
(Formerly 170Bk82)

Fact that West German subsidiary of Massachusetts parent corporation purchased half its inventory and some bookkeeping and accounting services from Massachusetts parent did not make West German subsidiary amenable to suit under Massachusetts long-arm statute, and, therefore, United States District Court did not have jurisdiction over West German subsidiary. M.G.L.A. c. 223, § 38; c. 223A, § 3.

Cases that cite this headnote

[5] **Federal Courts**
Particular Entities, Contexts, and Causes of Action

170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2758 Aliens and Alien Entities
170Bk2760 Particular Entities, Contexts, and Causes of Action
170Bk2760(1) In general
(Formerly 170Bk82)
170B Federal Courts
170BX Personal Jurisdiction
170BX(B) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction
170Bk2758 Aliens and Alien Entities
170Bk2762 Related or affiliated entities; parent and subsidiary
(Formerly 170Bk82)

Even if West German subsidiary's purchase contract by which subsidiary purchased half its inventory and some bookkeeping and accounting services from its Massachusetts parent amounted to transaction of business in Massachusetts within meaning of Massachusetts long-arm statute, plaintiff's cause of action for employment discrimination did not arise from subsidiary's transaction of business in Massachusetts, as required by long-arm statute, nor did plaintiff's claim fit within any other sections of long-arm statute, and, therefore, District Court did not have jurisdiction over claim that West German subsidiary violated plaintiff's civil rights in West Germany. M.G.L.A. c. 223, § 38; c. 223A, §§ 3, 3(a–g); Civil Rights Act of 1964, §§ 701–718 as amended 42 U.S.C.A. §§ 2000e to 2000e–17.

7 Cases that cite this headnote

[6] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 In general

(Formerly 170Ak2497)

In action brought by United States citizen residing in West Germany against Massachusetts parent corporation and its West German subsidiary alleging discriminatory personnel practices, general statement that subsidiary obtained all of its materials directly or indirectly from parent and did all of its business through control of parent did not stand in way of summary judgment for subsidiary on grounds that United States District Court in Massachusetts did not have personal jurisdiction. Fed.Rules Civ.Proc. Rule 56(e, f), 28 U.S.C.A.

5 Cases that cite this headnote

[7] Federal Civil Procedure

Subsequent proceedings; reconsideration of denial of motion

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2559 Subsequent proceedings; reconsideration of denial of motion

Once District Court granted summary judgment in favor of Massachusetts parent corporation and West German subsidiary in action by plaintiff alleging discriminatory employment practices, motion for reconsideration which was construed as motion to vacate judgment containing affidavit of plaintiff's wife was insufficient to justify setting aside prior judgment where such affidavit was not offered prior to entry of judgment and, in addition, no explanation was given for failure to present affidavit or its contents earlier, and no claim that further facts became known to plaintiff only after judgment had been entered. Fed.Rules Civ.Proc. Rule 60(b), (b)(1, 6), 28 U.S.C.A.

30 Cases that cite this headnote

Attorneys and Law Firms

***26** Diego Mas Marques on brief pro se.

Ronald M. Green, Susan S. Savitt, Philip M. Berkowitz and Epstein Becker Borsody & Green, P.C., New York City, on brief for defendants, appellees.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

Opinion

BOWNES, Circuit Judge.

Diego Mas Marques, a United States citizen living in Germany, alleges employment discrimination by Digital Equipment GmbH (Digital GmbH), a West German corporation that rejected his applications for an accounting or clerical position in Germany in 1977 and thereafter. According to Mas Marques, Digital GmbH has a policy of preferring German nationals for employment, and classifies jobs according to sex and age, as evidenced by its newspaper advertisements. Invoking Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ss 2000e-2000e-17, Mas Marques filed suit in the federal district court of Massachusetts against Digital GmbH and its parent company, Digital Equipment Corporation (Digital Corp.), a Massachusetts corporation.[1] The district court granted summary judgment for the defendants and denied a motion for reconsideration. From these rulings Mas Marques appeals. We affirm.

1 As the district court noted, Mas Marques did not bring suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. ss 621-634. Moreover, he did not allege his age in his complaint or specifically allege that he was denied employment because of his age.

THE GRANT OF SUMMARY JUDGMENT

Digital Corp. manufactures and sells computers and computer components and has facilities in the United States, Puerto Rico and Ireland; its wholly owned subsidiary Digital GmbH manufactures, repairs and distributes computers and related products in West Germany. The district court granted summary judgment to both defendants on the grounds that Digital Corp. did not exercise sufficient control over Digital GmbH to be liable for its alleged discrimination and that there was no personal jurisdiction over Digital GmbH. We merely elaborate on the district court's well-reasoned opinion, which is reported at 490 F.Supp. 56 (D.Mass.1980).

[1] **[2]** **[3]** With respect to Digital Corp., the district court correctly determined that the affidavits submitted in support of summary judgment negate its liability.[2] Although Mas Marques alleged in his complaint that Digital Corp. is "fully responsible for (Digital GmbH's) general policy of employment discrimination," the defendants' affidavits establish that Digital GmbH personnel policies, advertising, and decisions are formulated without the involvement of Digital Corp.[3] Moreover, the affidavits depict a genuine parent-subsidiary relationship in which there are separate corporate structures, facilities, work forces, business records, bank accounts, tax returns, financial statements, budgets and corporate reports. Although Digital GmbH does purchase fifty percent of its inventory of computers and computer components from Digital Corp. and occasionally contracts with Digital Corp. for accounting or bookkeeping services, ***27** the affidavits assert that Digital Corp. does not control Digital GmbH's sales goals or marketing strategies, and sales catalogues and advertising are done separately. On the basis of the defendants' affidavits, there was no recognized theory upon which Digital Corp. could be held responsible under Title VII for the acts of Digital GmbH. The two companies would not, in our opinion, be a single enterprise or employer under the test developed by the National Labor Relations Board and applied by some courts in Title VII cases. E. g., Radio and Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965) (considering (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership); Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977); Linskey v. Heidelberg Eastern, Inc., 470 F.Supp. 1181, 1183-84 (E.D.N.Y.1979); EEOC v. Upjohn Corp., 445 F.Supp. 635, 638 (N.D.Ga.1977). Nor would Digital Corp. be liable on the theory that the parent-subsidiary relationship is a sham, see Hassell v. Harmon Foods, Inc., 336 F.Supp. 432, 433 (W.D.Tenn.1971), aff'd, 454 F.2d 199 (6th Cir. 1972), or that Digital Corp. so controls Digital GmbH as to make Digital GmbH its agent, see Linskey v. Heidelberg Eastern, Inc., supra, at 1183-84; EEOC v. Upjohn Corp., supra, at 638.

2 Affidavits were submitted by Ronald Green, attorney for the defendants, Walter Wagner, Personnel Manager at Digital GmbH, and Seymour Sackler, Assistant General Counsel of Digital Corp.

3 More specifically, the affidavits indicate that Digital GmbH's personnel policies and procedures are formulated by a European Personnel Policies Committee (staffed by employees of Digital International, a Swiss corporation, and its various subsidiaries), expanded and adapted to German law and custom by a German management team of Digital GmbH and implemented by Digital GmbH employees.

The district court was likewise correct in concluding that Mas Marques' opposition papers did not suffice to create a genuine issue of fact concerning Digital Corp.'s liability. In his two "oppositions" to summary judgment, which were unsworn and unsupported by affidavits, Mas Marques asserted a close relationship between Digital Corp. and Digital GmbH, but his statements about the corporate relationship were conclusory (e. g., the companies are "one and the same," their parent-subsidiary relationship is a "sham," Digital Corp. "impermissibly controlled" Digital GmbH, Digital management "takes its orders from" Digital Corp.). Even reading the pro se opposition papers liberally, in accordance with Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972), and United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962), they do not comply with Rule 56(e), Fed.R.Civ.P., which required Mas Marques to "set forth specific facts showing that there (was) a genuine issue for trial." Although Mas Marques, as a pro se litigant, may not have been aware of Rule 56(e) when he filed his first opposition, the defendants' reply memorandum put him on clear notice of the rule and the deficiencies of his initial response. When specific facts were not forthcoming in the second opposition, and no attempt to provide them or conduct discovery was made, see Fed.R.Civ.P. 56(f),[4] the district court was well warranted in granting summary judgment for Digital Corp. See generally Palmigiano v. Mullen, 491 F.2d 978, 980 (1st Cir. 1974). Mas Marques' promise to prove his general allegations about the relationship between Digital Corp. and Digital GmbH through corporate records at trial was simply not enough to require a trial as to Digital Corp. Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir. 1975), cert. denied, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 54 (1976).[5]

4 Discovery never got off the ground in this case. The defendants served a notice that Mas Marques' deposition would be taken in Massachusetts, but Mas Marques declined to appear on the ground that he did not have the financial means to travel to Massachusetts. In his response to the notice of deposition, he suggested the deposition take place in Munich at a date to be agreed upon and requested the production of various records and documents at such oral examination. But there is

no indication any deposition was ever taken or that Mas Marques made any further attempt at discovery.

5 Apart from alleging generally that Digital GmbH and Digital Corp. should be treated as one, Mas Marques hinted in his opposition papers that Digital Corp. should be put to trial because it responded to an EEOC investigation and the EEOC issued a notice of right to sue Digital Corp. We have examined the letters from Digital Corp. to the EEOC and the EEOC letters and documents Mas Marques filed with the district court, and see nothing in them that would warrant a trial against Digital Corp. Although Digital Corp. expressed willingness to investigate Mas Marques' charges and to cooperate with the EEOC, it did not concede responsibility for the actions of Digital GmbH. And, although the EEOC issued a notice of right to sue Digital Corp., it did so at Mas Marques' request and does not appear to have made any determination that Digital Corp. would be responsible for Title VII violations by Digital GmbH.

***28** **[4]** **[5]** With respect to the defendant Digital GmbH, the district court justifiably ruled that nothing in the defendants' affidavits would support the exercise of personal jurisdiction pursuant to Mass.G.L. c. 223, s 38, or c. 223A, s 3. The former provision permits service of process on a foreign corporation that is "engaged in or soliciting business in the commonwealth, permanently or temporarily." In Caso v. Lafayette Radio Electronics Corp., 370 F.2d 707, 712 (1st Cir. 1966), we interpreted Massachusetts law to allow resort to this provision only if a foreign corporation's activities affected Massachusetts commerce substantially or so affected the transaction at issue as to make Massachusetts an appropriate forum, and we held that the fact that a Massachusetts subsidiary of a New York corporation bought inventory partly from its parent, inter alia, did not support the exercise of jurisdiction over the out-of-state parent. See also Farkas v. Texas Instruments, Inc., 429 F.2d 849, 850 (1st Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1193, 28 L.Ed.2d 324 (1971); Wilson v. Holiday Inn Curacao, NV, 322 F.Supp. 1052, 1054 (D.Mass.1971). No Massachusetts decision after Caso convinces us that a Massachusetts court would invoke c. 223, s 38 to exercise jurisdiction over Digital GmbH simply because it purchased half its inventory and some bookkeeping and accounting services from its Massachusetts parent. Moreover, these factors did not make Digital GmbH amenable to suit under the Massachusetts long arm statute, Mass. G.L. c. 223A, s 3. Even assuming that Digital GmbH's purchase contracts with Digital Corp. amounted to the transaction of business in Massachusetts within the meaning of subsection (a) of c. 223A, s 3 ("transacting any business in this Commonwealth"), Mas Marques' cause of action for employment discrimination did not arise from Digital GmbH's transaction of business in Massachusetts, as required by the statute. Compare Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079, 1084-85 (1st Cir. 1973). Nor did Mas Marques' claim fit within any of the other subsections of the long arm statute, c. 223A, s 3(b)-(g). [6]

6 Mas Marques suggests that subsection (d) of Mass.G.L. c. 223A, s 3 is applicable to his case, but we fail to see how his cause of action arises from Digital GmbH's "causing tortious injury in this commonwealth." Compare Engine Specialties, Inc. v. Bombardier, Ltd., 454 F.2d 527, 529 (1st Cir. 1972).

[6] Furthermore, Mas Marques presented nothing in his oppositions that supported the exercise of personal jurisdiction over Digital GmbH. In addition to the allegations noted above, he stated only that Digital GmbH "obtain(ed) all of its materials" directly or indirectly from Digital Corp. and did "all of its business through the control" of Digital Corp. Such generalities did not stand in the way of summary judgment for Digital GmbH. Cf. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 904-06 (1st Cir. 1980) (conclusory allegations as to corporate interrelationship not sufficient to confer personal jurisdiction under Puerto Rico's long arm statute).

THE DENIAL OF RECONSIDERATION

[7] More than ten days after the district court granted summary judgment for the defendants, Mas Marques filed a "motion for reconsideration," which we construe as a motion to vacate judgment pursuant to Rule 60(b), Fed.R.Civ.P. In the motion, Mas Marques stated that he was enclosing an affidavit "to controvert the facts averred brought forward by Defendants in their motion for summary judgment," and urged that "(a)s a result of this motion and affidavit the facts described by Defendants concerning their respective corporate structures should not be taken as true." The affidavit contained the following statements pertinent to the relationship between Digital Corp. and Digital GmbH:

2. That Digital Corp. the parent fully controls Digital GmbH, that further the Corporation controls in full ***29** through data processing systems the sales of all the material and orders placed to and sold by Digital GmbH, that in addition it fully controls the marketing strategies of Digital GmbH by means of closely related

management meetings by Digital Corp. in the United States.

3. That Digital Corp. was requested by the management of Digital GmbH to make a decision as to my employment application and that I was advised by Digital GmbH management officials that the corporation had reached the final denial of my application for employment for any positions. The contacts by those officials were made through telephone conversations and telex.

4. That corporate papers and finances are fully controled (sic) by Digital Corp. and that further for the purpose of control Digital Corp. transfers its management and technical employees to Digital GmbH to manage Digital GmbH.

5. Digital Corp. expressly controls the financial personnel policy of Digital GmbH and particularly the hiring and firing of United States citizens.

6. That it is systematically categorized most employment positions according to age, sex and national origin by Digital Corp. through Digital GmbH and fully under the control of the Corp. for the purposes of better finance results.

The affidavit was certified as "the truth to the best of our knowledge and belief" and was signed under the pains and penalties of perjury by Mas Marques and his wife Angelika, who represented that she had witnessed Digital's discrimination policies and was present at several meetings and had telephone contacts with Digital GmbH and Digital Corp. The district court denied the motion for reconsideration, stating that the affidavit "does not appear to be based upon personal knowledge as required by F.R.Civ.P. 56(e), nor does it appear that the plaintiff could have acquired such personal knowledge."

There was no error. Although some of the statements in the affidavit were more specific than those in the previously filed oppositions, most of them were not, as the district court noted, based upon personal knowledge. One possible exception is the statement in paragraph 3 to the effect that Digital GmbH officials told Mas Marques that Digital Corp. made the final decision not to hire him. We need not decide whether this statement satisfied the "personal knowledge" requirement of Rule 56(e) and would have been admissible in evidence, as also required by Rule 56(e). See Corley v. Life and Casualty Insurance Co. of Tennessee, 296 F.2d 449, 450 (D.C.Cir.1961); 6 Pt. 2 Moore's Federal Practice P 56.22(1), at 56-1322 & n.16 (2d ed. 1980). Nor need we decide whether such a statement, unaccompanied by disclosure of the identity of the Digital GmbH officials to whom Mas Marques supposedly spoke or the date of the conversation(s), would have been "sufficient evidence" to require a trial, if offered in timely opposition to the defendants' summary judgment motion, First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968), quoted in Hahn v. Sargent, supra, 523 F.2d at 464. Compare Williams v. Evangelical Retirement Homes, 594 F.2d 701, 704 (8th Cir. 1979). The fact remains that Mas Marques' affidavit was not offered prior to the entry of judgment; in addition, no explanation was given for the failure to present the affidavit or its contents earlier, and no claim was made that further facts became known to Mas Marques only after judgment had been entered. In these circumstances, particularly where Mas Marques should have been aware of the deficiencies in his case before the entry of judgment, relief under Rule 60(b) would not have been justified. Grounds for relief under Rule 60(b)(1), due to "mistake, inadvertence, surprise, or excusable neglect," were not presented.

> (A) party cannot have relief under Rule 60(b)(1) merely because he is unhappy with the judgment. Instead he must ***30** make some showing of why he was justified in failing to avoid mistake or inadvertence .... A defeated litigant cannot set aside a judgment ... because he failed to present on a motion for summary judgment all of the facts known to him that might have been useful to the court.

11 Wright & Miller, Federal Practice and Procedure s 2858, at 170-73 (1973 ed.) (emphasis supplied). See Couch v. Travelers Insurance Co., 551 F.2d 958, 959-60 (5th Cir. 1977). Nor were there exceptional circumstances or obvious injustices warranting relief under Rule 60(b)(6). See Ackermann v. United States, 340 U.S. 193, 197-200, 71 S.Ct. 209, 211-212, 95 L.Ed. 207 (1950); Scola v. Boat Frances, R., Inc., 618 F.2d 147, 154-56 (1st Cir. 1980). In short, there was no abuse of discretion in the denial of the motion for reconsideration. See Pagan v. American Airlines, Inc., 534 F.2d 990, 993 (1st Cir. 1976).

CONCLUSION

For the reasons stated above, we uphold the district court's grant of summary judgment for want of jurisdiction and its denial of reconsideration. It is too late for appellant to try to redeem his case by asserting on appeal that the defendants committed perjury in their affidavits and by urging this court to request records from Digital Corp.[7] As the judgment must be affirmed, we do not reach the question whether Title VII can be given extraterritorial application to alleged discrimination abroad.

[7] Nothing in Shapiro v. United States, 335 U.S. 1, 33, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), or the passages at 247 (or 274) U.S. 259, 263, 264 (1927), cited by Mas Marques, would authorize this court to supplement the record on appeal by requesting records from Digital Corp. The record on appeal is confined to matters presented to the district court. See Fed.R.App.P. 10(b).

Affirmed.

All Citations

637 F.2d 24, 24 Fair Empl.Prac.Cas. (BNA) 1286, 24 Empl. Prac. Dec. P 31,415, 30 Fed.R.Serv.2d 1079

Exhibits 103 and 104 have been removed from this pdf.

DY-4 Corporation

c/o Fiddler, Gonzalez & Rodriguez
Chase Manhattan Bank Building
254, Munoz Rivera Avenue, 6th Floor
Hato Rey (Puerto Rico) 00918

Tel: (809) 759-3177
Fax: (809) 754-7539

November 4, 1992

Mr. Miguel A. Nazario
President, General Manager
DIGITAL EQUIPMENT CORPORATION DE PUERTO RICO
P.O. Box 106
San German (Puerto Rico)
00753

Dear Miguel,

In order to complete our underground water franchise application to the Department of Natural Resources Underground Water Franchise Section, we need a letter from Digital transferring all vested underground water rights to DY-4 Corporation.

I would appreciate very much if this letter, which should be addressed to DY-4 Corporation, be sent as soon as possible directly to the attention of Dr. Guillermo Perez-Martinez of Unipro, P.O. 10914, Caparra Station, San Juan (Puerto Rico), 00922-0914 (tel: (809) 793-3950), with a copy faxed to me at (514) 694-5459.

I thank you for your continuous and greatly appreciated cooperation and look forward to see you sometime during our next trip to Puerto Rico, which is planned to be from November 16th to November 20th.

Best Regards,

Jean-Pierre Landry, c.a., Lawyer
Vice President

JPL/cp

circo craft

Transmission par Fax

DESTINATEUR / ADDRESSEE : Mr. Nazario
(809) 892-1946 2461

EXPÉDITEUR / SENDER : Jean-Pierre Landry, c.a. lawyer
Legal Adviser
COMPAGNIE CIRCO CRAFT INC. / CIRCO CRAFT CO. INC.
17600, route Transcanadienne, Kirkland (Québec)
Tel: (514) 694-8000 Fax: (514) 694-5459

DATE : Le 4 novembre 1992 / November 9, 1992

OBJET / SUBJECT :

Nombre de pages incluant celle-ci / Number of pages including this one : 2

Si vous éprouvez des difficultés avec ce document, veuillez nous aviser immédiatement au (514) 694-8000.

If you're having difficulties with this document, please advise us immediatly at (514) 694-8000

* * * MESSAGE * * *

2.1

UNIPRO
ARCHITECTS, ENGINEERS AND PLANNERS

DOUGLAS CUMMINGS, P E
JORGE L. FIGUEROA, P E
JOSE C. MANGUAL, P E.
CARLOS RAUL PEREZ-BRAS, P E.
GUILLERMO PEREZ-MARTINEZ, PH D., P E

December 23, 1992

Eng. José Rivera
NPDES Stormwater Program
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, NY 10278

Re: Stormwater Notice Of Intent
DY-4 Corporation
UNIPRO Project No. 92095

Dear Mr. Rivera:

Enclosed please find Notice Of Termination (NOT) completed by Digital equipment Corporation (Digital) for the Circuit Board Manufacturing facility located in San Germán, Puerto Rico (see Attachment No. 1). This action is needed since this facility will be owned and operated by DY-4 Corporation. Please note that DY-4 will be engaged in a similar circuit board manufacturing activity as Digital, maintaining, the same SIC Codes (3672 and 3679).

Together with the above and as required in the stormwater regulation, we are including herein copy of the Notice Of Intent (NOI) completed by DY-4 for the aforementioned existing manufacturing facility (See Attachment No. 2). This document was forwarded to your office on October 21, 1992.

If additional information in regard to this subject is needed, please do not hesitate to contact us at your earliest convenience.

Cordially yours,

Guillermo Pérez-Martinez, Ph.D., P.E.

er

Enclosures

pc P. Maldonado - PREQB
A. Abadia - DY-4
A. Serrano - Digital
F. Torres - Goldman Antonetty

P.O. BOX 10914, CAPARRA STATION, SAN JUAN, P.R. 00922-0914 TEL. (809) 793-3950 FAX (809) 793-8593

ATTACHMENT NO. 1
NOTICE OF TERMINATION
DY-4 CORPORATION
DECEMBER 1992

UNIPRO
ARCHITECTS, ENGINEERS AND PLANNERS

Appendix D—Notice of Termination and Instructions

Please See Instructions Before Completing This Form

Form Approved. OMB No. [illegible]
Approval expires 6-30-95

NPDES FORM

EPA

United States Environmental Protection Agency
Washington, DC 20460

Notice of Termination (NOT) of Coverage Under the NPDES General Permit for Storm Water Discharges Associated with Industrial Activity

Submission of this Notice of Termination constitutes notice that the party identified in Section II of this form is no longer authorized to discharge storm water associated with industrial activity under the NPDES program. ALL NECESSARY INFORMATION MUST BE PROVIDED ON THIS FORM.

I. Permit Information

NPDES Storm Water General Permit Number: [ ]

Check Here if You are No Longer the Operator of the Facility: [X]

Check Here if the Storm Water Discharge is Being Terminated: [ ]

II. Facility Operator Information

Name: DIGITAL EQUIPMENT CORPORATION Phone: 809 892 1944

Address: P.O. BOX 106

City: SAN GERMAN State: PR ZIP Code: 00683

III. Facility/Site Location Information

Name: DIGITAL EQUIPMENT CORPORATION

Address: PR ROAD NO. 362 KM 1.0

City: SAN GERMAN State: PR ZIP Code: 00683

Latitude: 18 05 19 Longitude: 67 02 18 Quarter: [ ] Section: [ ] Township: [ ] Range: [ ]

IV. Certification: I certify under penalty of law that all storm water discharges associated with industrial activity from the identified facility that are authorized by a NPDES general permit have been eliminated or that I am no longer the operator of the facility or construction site. I understand that by submitting this Notice of Termination, I am no longer authorized to discharge storm water associated with industrial activity under this general permit, and that discharging pollutants in storm water associated with industrial activity to waters of the United States is unlawful under the Clean Water Act where the discharge is not authorized by a NPDES permit. I also understand that the submittal of this Notice of Termination does not release an operator from liability for any violations of this permit or the Clean Water Act.

Print Name: MIGUEL NAZARIO Date: 11/09/92

Signature: [signature]

Instructions for Completing Notice of Termination (NOT) Form

Who May File a Notice of Termination (NOT) Form

Permittees who are presently covered under the EPA issued National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Industrial Activity may submit a Notice of Termination (NOT) form when their facilities no longer have any storm water discharges associated with industrial activity as defined in the storm water regulations at 40 CFR 122.26 (b)(14), or when they are no longer the operator of the facilities.

For construction activities, elimination of all storm water discharges associated with industrial activity occurs when all disturbed soils at the construction site have been finally stabilized and temporary erosion and sediment control measures have been removed or will be removed at an appropriate time, or that all storm water discharges associated with industrial activity from the construction site that are authorized by a NPDES general permit have otherwise been eliminated. Final stabilization means that all soil-disturbing activities at the site have been completed, and that a uniform perennial vegetative cover with a density of 70% of the cover for unpaved areas and areas not covered by permanent structures has been established, or equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) have been employed.

Where to File NOT Form

Send this form to the the following address:

Storm Water Notice of Termination
P.O. Box 1185
Newington, VA 22122

Completing the Form

Type or print, using upper-case letters, in the appropriate areas only. Please place each character between the marks. Abbreviate if necessary to stay within the number of characters allowed for each item. Use only one space for single between words, but not for punctuation marks unless they are needed to clarify your response. If you have any questions about this form, call the Storm Water Hotline at (703) 821-4823.

PLEASE SEE REVERSE OF THIS FORM FOR FURTHER INSTRUCTIONS

EPA Form 3510-7 (9-92)

ATTACHMENT NO. 2
NOTICE OF INTENT
DY-4 CORPORATION
DECEMBER 1992

UNIPRO
ARCHITECTS, ENGINEERS AND PLANNERS

DY-4 Corporation

c/o Fiddler, Gonzalez & Rodriguez
[illegible]
254 Muñoz Rivera Avenue, 9th Floor
Hato Rey (Puerto Rico) 00918

Tel (809) 753-3113
Fax (809) 753-9000

October 21, 1992

CERTIFIED RETURN
RECEIPT REQUESTED

Director of the NPDES Program
Storm Water Notice of Intent
PO Box 1215
Newington, VA 22122

Re: Notice of Intent (NOI)
Change of Ownership

Dear Sirs:

Enclosed you will find an updated Notice of Intent (NOI) covering the facility originally owned by Digital Equipment Corporation, located in State Road No. 362, Km. 1.0, San Germán, Puerto Rico.

This facility was recently acquired by DY-4 Corporation, action that requires proper notification to all regulatory agencies, as well as the transfer of all operation permits.

To address the above, we are including herewith copy of the Revised Notice of Intent for storm water discharges indicating the new owner name as required in 40 CFR 122.28.

Please do not hesitate to contact us if additional information regarding this subject is needed.

Cordially,

Américo Abadía
General Manager

na

Enclosure

pc Mr. Pedro Maldonado, President
PR Environmental Quality Board

See Reverse for Instructions

Form Approved. OMB No. 2040-0086
Approval Expires 8-31-94

NPDES FORM

EPA

United States Environmental Protection Agency
Washington, DC 20460

Notice of Intent (NOI) for Storm Water Discharges Associated with Industrial Activity Under the NPDES General Permit

Submission of this Notice of Intent constitutes notice that the party identified in Section I of this form intends to be authorized by a NPDES permit issued for storm water discharges associated with industrial activity in the State identified in Section II of this form. Becoming a permittee obligates such discharger to comply with the terms and conditions of the permit. ALL NECESSARY INFORMATION MUST BE PROVIDED ON THIS FORM.

I. Facility Operator Information

Name: D.Y.-4 CORPORATION Phone: 8 0 9 8 9 2 1 9 4 6

Address: P.O. BOX 106 Status of Owner/Operator: P

City: SAN GERMAN State: PR ZIP Code: 0 0 6 8 3

II. Facility/Site Location Information

Name: D.Y.-4 CORPORATION

Is the Facility Located on Indian Lands? (Y or N): N

Address: PR. ROAD NO. 362, KM. 1.0

City: SAN GERMAN State: PR ZIP Code: 0 0 6 8 3

Latitude: 1 8 0 5 3 0 Longitude: 6 7 0 2 1 8 Quarter: Section: Township: Range:

III. Site Activity Information

MS4 Operator Name: SAN GERMAN MUNICIPALITY

Receiving Water Body: GUANAJIBO RIVER

If You are Filing as a Co-permittee, Enter Storm Water General Permit Number: N/A

Are There Existing Quantitative Data? (Y or N): N

Is the Facility Required to Submit Monitoring Data? (1, 2, or 3): 2

SIC or Designated Activity Code: Primary: 3 6 7 2 2nd: 3 6 7 9 3rd: N/A 4th:

If This Facility is a Member of a Group Application, Enter Group Application Number: N/A

If You Have Other Existing NPDES Permits, Enter Permit Numbers: N/A

IV. Additional Information Required for Construction Activities Only

Project Start Date: N/A

Completion Date: N/A

Estimated Area to be Disturbed (in Acres): N/A

Is the Storm Water Pollution Prevention Plan in Compliance with State and/or Local Sediment and Erosion Plans? (Y or N):

V. Certification

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on the inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Print Name: AMERICO ABADIA

Date: 12/09/92

Signature:

EPA Form 3510-6 (8-92)